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No. 83-606

# In the Supreme Court of the United States

OCTOBER TERM, 1983

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CITY OF MISSION, SOUTH DAKOTA AND MISSION GOLF COURSE, INC., PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## QUESTION PRESENTED

Whether the lower courts correctly determined that petitioners' liquor establishments are not located upon "fee-patented lands in non-Indian communities," and accordingly are not exempt from federal Indian liquor laws.

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### OPINIONS BELOW

The per curiam opinion of the court of appeals (Pet. App. 2a-4a) is unreported. The district court's opinion (Pet. App. 5a-24a) is reported at 548 F. Supp. 1177.

### JURISDICTION

The judgment of the court of appeals was entered on May 16, 1983, and a timely petition for rehearing was denied on June 13, 1983 (Pet. App. 1a-4a). By order of Justice Blackmun, dated August 30, 1983, the time for filing a petition for a writ of certiorari was extended to October 10, 1983. The petition was filed on October 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioners, the City of Mission and Mission Golf Course, Inc., each operate a liquor-dispensing establishment within the exterior boundaries of the Rosebud Sioux Indian Reservation in South Dakota. They seek review of a judgment holding that they must comply with federal laws regulating sales and possession of liquor within Indian country, including the requirement that they comply with tribal law.

Sections 1154 and 1156 of Title 18 of the United States Code generally prohibit the selling or possession of alcoholic beverages in "Indian country." Although, for most purposes, "Indian country" encompasses "all land within the limits of any Indian reservation under the jurisdiction of the United States Government," regardless of non-Indian land ownership or population (see 18 U.S.C. 1151(a)), a more restrictive definition governs here. Pursuant to the Act of May 24, 1949, ch. 138, §§ 27 and 28, 63 Stat. 94, Sections 1154 and 1156 each provide that "the term 'Indian country' as used in this section does not include fee-patented lands in non-Indian communities * * *." By the Act of Aug. 15, 1953, ch. 502, § 2, 67 Stat. 586, Congress permitted the sale of liquor even within "Indian country," as narrowly defined, but only —

> provided such act or transaction is in conformity both with the laws of the State in which the act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.

18 U.S.C. 1161.

In conformity with this statute, the Rosebud Sioux Indian Tribe, a federally recognized tribe organized under the Indian Reorganization Act of 1934, 25 U.S.C. 476 *et seq.*, adopted a liquor ordinance in 1978. On October 13,

1978, the text of the ordinance, approved by the Secretary of the Interior, was published in the Federal Register (43 Fed. Reg. 47291). The liquor ordinance requires vendors of liquor on the Rosebud Reservation to acquire a tribal liquor license.

2. The City of Mission is an incorporated city under South Dakota state law and lies within the boundaries of the Rosebud Sioux Reservation (Pet. App. 10a-11a). The City operates a package liquor store within city limits. Approximately 80% of the City's liquor customers are Indian (Pet. App. 17a). Mission Golf Course is located approximately two miles south of city limits, also within the Rosebud Reservation (Pet. App. 17a). The Golf Course's liquor clientele is 50 to 65% Indian (Pet. App. 18a).

Adjacent to the City of Mission boundaries are two residential concentrations that are closer to Mission than is the Golf Course. Approximately 0.3 miles east of Mission's municipal boundary is an area known as East Antelope or simply Antelope. Most of the housing in East Antelope has been constructed since 1965 by the Rosebud Housing Authority, and is occupied almost exclusively by Indians. See Pet. 6; Pet. App. 10a-12a. The 0.3 mile gap between Mission and East Antelope is filled with businesses and Sinte Gleske College that residents of both Mission and East Antelope patronize. Contiguous with Mission's southern boundary, but also outside the City, is an area known as the Todd County school complex. The two schools located there are attended primarily by Indians. High school boarding students, teachers, and Bureau of Indian Affairs employees live on the complex. See Pet. App. 13a.

In 1980, Mission and the area immediately around Mission, including East Antelope and the Todd County school complex, had a total population of 1,737 persons, of which 69% (1,203 persons) were Indian (Pet. App. 11a-12a). The

City of Mission had a total population of 748 persons, 50.28% of which were Indian (Pet. App. 11a).[1]

3. The United States filed companion civil actions for declaratory and injunctive relief against petitioners, seeking to enjoin their sales of liquor except in conformity with the Rosebud Sioux Tribe's liquor ordinance. Petitioners admitted selling liquor without tribal licenses, but contended that their sales took place on fee-patented land in a non-Indian community, and that they accordingly were not within Indian country for purposes of 18 U.S.C. 1154 and 1156. See page 7 note 6, *infra*.[2] Based on the facts developed at trial and in a stipulation, from which the district court derived its findings (Pet. App. 10a-18a), the court had "little difficulty" in concluding that petitioners' liquor-dispensing establishments "are not located within non-Indian communities" (Pet. App. 18a). The district court rejected petitioners' contention that the court was "limited [as a matter of law] solely to an examination of the City of Mission within its legal boundaries" and found — as a matter of fact — an "element of cohesiveness" which precluded treating the City as a "community" separate from the surrounding residential areas, East Antelope and the school complex (Pet. App. 19a-20a).

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[1]Petitioners' establishments are centrally located in Todd County, South Dakota (Pet. App. 10a). Since 1930 the Indian share of the population of Todd County has increased from 47% to 78% (Pet. App. 11a).

[2]Petitioners also asserted that regulation of their liquor sales under the tribal liquor ordinance would violate the Due Process and Equal Protection Clauses of the United States Constitution because non-Indians cannot vote in tribal elections and because the liquor ordinance might be administered in a racially discriminatory fashion. The lower courts rejected these constitutional claims (Pet. App. 21a), which are not renewed here.

The district court permanently enjoined petitioners from selling liquor except in conformity with 18 U.S.C. 1161 and the Rosebud Sioux tribal liquor ordinance (Pet. App. 5a). The court of appeals affirmed on the basis of the district court's "well reasoned opinion" (Pet. App. 3a-4a), noting that "the record indicates that ample evidence was presented demonstrating that [petitioners] did not fall within the statutory exception" (Pet. App. 3a n.2).

4. The petition for writ of certiorari was filed on October 7, 1983.[3] With it, petitioners lodged 24 exhibits that are not part of the record below. On or about October 17, 1983, petitioners filed in the district court a motion pursuant to Fed. R. Civ. P. 60(b) to set aside the judgment on the basis of these and other exhibits. In their Rule 60(b) application, petitioners present the same argument that they do here —*i.e.*, that in determining the applicability of the non-Indian community exemption from federal Indian liquor laws the courts below should have restricted their consideration to the City of Mission proper.

## ARGUMENT

The question presented by the petition concerns only the application of settled law to the particular facts of this case. The factual determination that East Antelope, Mission, and the school complex are a cohesive community, and that the City of Mission accordingly should not be regarded as a separate non-Indian community, establishes no precedent, much less a precedent of general importance. The decision below does not conflict with any decision of this Court or any other court of appeals. Review by this Court accordingly is not warranted.

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[3]Petitioners' application for a stay pending filing and disposition of their petition for a writ of certiorari was denied on July 22, 1983, by Justice Blackmun.

1. Although petitioners contend (Pet. 16-17) that the district court misapplied *United States* v. *Mazurie*, 419 U.S. 544 (1975), by "refus[ing] to consider whether the City of Mission is itself a 'community' within the meaning of the non-Indian community provision", they point to nothing in *Mazurie* that supports their arguments. Contrary to petitioners' assertions, the district court did not hold, and we certainly do not argue, that a city *cannot* constitute a "community" which may in fact be legally outside Indian country for purposes of 18 U.S.C. 1154(c) and 1156. Nor did the lower courts decide as a matter of law to ignore Mission's boundaries. Instead, the district court simply rejected petitioners' contention that applicable law *requires* that, in determining the availability of the non-Indian community exemption, it limit its consideration to the City proper. The district court then found from the evidence in the record an "element of cohesiveness" that precluded treating Mission as a "community" separate from its surrounding area (Pet. App. 18a-20a).

The district court's analysis accords with relevant precedents. The court properly examined the area surrounding the subject liquor establishments (Mission and environs) to determine the nature and scope of the community in which they are located. See, *e.g.*, *Mazurie*, 419 U.S. at 551-552; *United States* v. *Morgan*, 614 F.2d 166, 169-170 (8th Cir. 1980).[4] The district court considered the pertinent evidence in light of the factors that define a community as summarized in *Morgan*, 614 F.2d at 170:

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[4]Petitioners apparently do not contend that it was error to consider such evidence. Petitioners state: "There is certainly no question that the territory surrounding the liquor establishment in question is to be examined in determining whether or not it is within a non-Indian community" (Pet. 17).

> Basic to the definitions of "community" which we have reviewed is the existence of an element of cohesiveness. This apparently can be manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality.[5]

Under this sensible approach the legal boundaries of any incorporated local government entity are a relevant consideration, but are not dispositive, in determining the "community" of reference. See also *Berry* v. *Arapahoe & Shoshone Tribes*, 420 F. Supp. 934, 940 (D. Wyo. 1976) ("community" defined for purpose of 18 U.S.C. 1154(c) as "a unified body of individuals * * * with a common interest living in a particular area; an interacting population of various kinds of individuals in a common location").[6]

Applying this standard, the district court found "an element of cohesiveness" that precluded treating Mission as a community distinct from its environs (Pet. App. 19a-20a). The record amply demonstrates that the economic and social patterns of the area bear little relationship to the City of Mission's geographic boundaries. Mission and the adjoining housing areas comprise a single cohesive community that clearly is not "non-Indian." See pages 3-4, *supra*.

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[5]In *Morgan*, decided subsequent to this Court's decision in *Mazurie*, the court of appeals held bars located within the Standing Rock Sioux reservation to be located in non-Indian communities, rejecting the Standing Rock Sioux Tribe's assertion that a "community" is for these purposes limited to an incorporated village or town (614 F.2d at 170).

[6]Indeed, petitioners insist that Mission Golf Course is part of the City of Mission "community" even though it is two miles outside city limits. At the same time, petitioners would exclude from the relevant community the Indian residential concentrations located closer to the city than is the golf course.

We agree with petitioners that *Mazurie* does not dictate that municipal boundaries be ignored. But neither does *Mazurie* dictate that the residents of the school complex and East Antelope be excluded from the relevant community simply because they reside outside the geographical boundaries of the City of Mission. Indeed, the Court rejected, in *Mazurie*, the claim that proof concerning the nature of the community must be "keyed to a geographical area with precise boundaries" (419 U.S. at 552). Under different factual circumstances, a court might properly conclude that a municipality such as Mission was by itself the community of reference. But, upon the facts appearing in the record of this case, no such a conclusion was warranted, much less required.[7] Certainly there is no plain error in the finding of the two courts below that Mission and its environs are one cohesive community.

2. Because the courts below did not hold that the reference community may never be limited to a city or town for 18 U.S.C. 1154 purposes, petitioners' discussion (Pet. 18-23) relating to the commonly understood meaning of community is misdirected. In any event, Congress's use of the non-technical term "community" in place of readily available terms such as "municipality" that call for reference to an incorporated entity, supports the analysis of the courts below.

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[7]Petitioners' apparent suggestion (Pet. 22) that only independent city services, history, and demographic composition of the resident population may be considered in determining whether a community is non-Indian can not be squared with the factors actually considered in *Mazurie* and *Morgan*. Rather, factors such as land ownership, degree of Indian business and social activities, the demographic composition of the liquor-buying clientele, and the demographic composition of the schools attended by children are also relevant. The district court considered the full range of applicable factors here in determining that "it cannot be said that [the non-Indian] elements [in the area] predominate" (Pet. App. 19a-20a).

Nor does the documentation lodged with this Court by petitioners show that the judgment below is contrary to the congressional intent behind enactment of the non-Indian community exception. As noted above (page 5), these documents are not part of the record. For this reason, presumably, petitioners have now moved in district court based on these and other documents to set aside the judgment. The possibility that petitioners may obtain relief from the judgment on their Rule 60(b) motion in the district court makes their case all the less suitable for review by this Court.

We have opposed petitioner's district court motion for relief from the judgment on the ground that the documents in question reflect at most the hope of certain individuals that Congress would exempt the City of Mission from Indian Country liquor laws. Nothing in the published legislative history or, for that matter, the unpublished private materials adduced by petitioners, suggests that Congress adopted the non-Indian country exemption, which is stated in generic terms, with the purpose or intent of achieving that specific result.

Even if the non-Indian community exception had been enacted in 1949 in contemplation of excepting Mission from the then absolute prohibition of liquor in Indian country, the classification of Mission as a non-Indian community over thirty years ago would not be determinative today. The demography and social environment of Mission and its immediate vicinity have not remained static since 1949.[8]

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[8]For example, construction of most of the East Antelope housing adjacent to Mission's east boundary occurred after 1965 (Pet. 6). The Indian population within the boundaries of Mission has increased from 33% of the total population in the 1940 census to a slight majority in the 1980 census (Pet. App. 17a). Indian participation in the Golf Course has increased since it was founded in 1965 by non-Indians so that by 1980, 50% of the members were Indians (Pet. App. 19a).

The generic language of the non-Indian community exemption grants petitioners no perpetual exemption from federal laws designed to protect Indians from abuses relating to the sale of alcohol.

3. Petitioners contend (Pet. 24) that the lower courts' decisions "directly and substantially conflict[]" with decisions that have treated Indian housing developments, such as East Antelope, as distinct communities for purposes of determining whether such residential areas are "dependent Indian communities" within the meaning of 18 U.S.C. 1151(b).[9] The two cases upon which petitioners rely both arise from within the Eighth Circuit, which could of course resolve any intra-circuit conflict — if one in fact, existed. But the alleged conflict is illusory.

Instead, the allegedly discrepant results on which petitioners rely merely reflect application of consistent legal principles to the particular records of the cases. For example, in *United States* v. *South Dakota*, 665 F.2d 837 (8th Cir. 1981), an Indian housing project was held to be a dependent Indian community. There the State argued for the first time on appeal that the entire City of Sisseton, South Dakota — rather than the housing project — was the proper community of reference (665 F.2d at 841). The Eighth Circuit declined to consider the issue because the State had not raised the argument at trial (*ibid.*). Nor does the judgment here conflict with *United States* v. *Mound*, 477 F. Supp. 156 (D. S.D. 1979), a criminal case brought by the United States against several Indian defendants. Defendants there challenged the United States' jurisdiction alleging

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[9]Indian country is defined by 18 U.S.C. 1151(b) to include "dependent Indian communities" regardless of location. Dependent Indian communities that are not on Indian reservations accordingly are subject to federal criminal jurisdiction in the same manner as Indian reservations. See 18 U.S.C. 1151-1153.

that the crimes occurred outside an Indian reservation at an Indian housing project at Eagle Butte, South Dakota. From the court's opinion it appears that defendants never questioned the scope of the community of reference. The opinion focuses entirely on whether the housing development itself was both "dependent" and "Indian" for purposes of 18 U.S.C. 1151(b).

Petitioners also suggest (Pet. 26) that in *United States* v. *Morgan, supra*, the Eighth Circuit failed to treat an Indian housing project located adjacent to McLaughlin, South Dakota, as part of the non-Indian community of McLaughlin. Petitioners may know that such an Indian housing project in fact exists outside McLaughlin, but that "fact" was neither mentioned nor considered by the court of appeals. In *Morgan*, the United States and the Standing Rock Sioux Tribe conceded that McLaughlin was a "non-Indian community," but urged that the bar in question —which lay outside the city's municipal boundaries — was simply not a part of that "community." The Eighth Circuit rejected that argument (614 F.2d at 170), and certainly did not indicate that there was any basis in the record from which it might conclude that the bar was part of a larger, predominantly Indian, community of reference.[10]

* * * * *

In sum it is petitioners, not the courts below, whose analysis rests on the faulty "assumption that a community is a monolithic entity which is mutually exclusive of other communities" (Pet. 27). The judgment here rests on precisely the fact-sensitive, "flexible" concept of community

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[10]In any event, the scope of the community of reference is highly dependent on the factual setting in which a case arises, and the question is not identical in every legal context. Thus, a finding that an Indian housing development constitutes a *dependent* Indian community in one locale does not require that East Antelope be considered a *separate* Indian community in this context. Cf. Mazurie, 419 U.S. at 553 n.10.

(*ibid.*) that petitioners purport to espouse. Further review by this Court of the basically factual determination in this case would be inappropriate.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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